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12 *Toyota Motor Sales USA, Inc., Saatchi & Saatchi*
North America, Inc., and Smuggler, Inc.

United States District Court

District of Nevada

16 Eric E. Dahl,

17 Plaintiff,

18 v.

19 Toyota Motor Sales USA, Inc., Saatchi &
20 Saatchi North America, Inc., Smuggler,
21 Inc., Does I through X, and Roe
Corporations I through X, inclusive,

22 Defendants.

Case No. 2:14-cv-01737-JCM-(PAL)

**DEFENDANTS' MOTION TO DISMISS
PLAINTIFF'S COMPLAINT PURSUANT
TO FED. R. CIV. P. 12(b)(6)**

POINTS AND AUTHORITIES

Defendants Toyota Motor Sales USA, Inc., Saatchi & Saatchi North America, Inc., and Smuggler, Inc. (collectively, “Defendants”) hereby move to dismiss the complaint of Plaintiff Eric E. Dahl (“Plaintiff” or “Mr. Dahl”) pursuant to Fed. R. Civ. P. 12(b)(6), and submit the following Points and Authorities in support of their Motion.

PRELIMINARY STATEMENT

In his Complaint, Mr. Dahl asserts one claim of copyright infringement and one claim for attorneys’ fees and costs incurred as a result of the alleged infringement against all Defendants, claiming that Defendants infringed his copyright in a book titled “B.B. King’s Lucille and the Loves Before Her” (“the Book”). Mr. Dahl’s self-published book recounts, in part, Plaintiff’s real-life experience locating a stolen guitar in a pawn shop and returning it to Mr. King, its rightful owner. Mr. Dahl asserts that because a young woman in Defendants’ 2015 Toyota Camry television commercial (“the Ad”) finds a guitar that had been left in a storage room which turns out to have originally belonged to Mr. King, the Ad is based upon “Plaintiff’s story” (Compl., ¶ 12.) Mr. Dahl’s claims fail as a matter of law.

It is a fundamental tenet of copyright law that copyright protection is only afforded to an artist’s original, creative expression. Copyright does not protect facts, ideas, systems, methods of operation, and/or any expression that is not original to the author. But that is precisely what Plaintiff seeks to do here. Whatever protection the Book may have under the Copyright Act is limited to Mr. Dahl’s expression of the story told in the work. Fatal to his claim, Mr. Dahl conflates the concept of the expression of the story (protectable) with the basic idea of the story (not protectable). The concept of a musician who loses a musical instrument which is later found and returned is not unique to Plaintiff nor can he claim copyright protection over all such stories. Nor does the fact that the musician in both stories is Mr. King change that result; as a matter of law, Plaintiff must point to the expression of his own story in the Ad, not some common facts, to make out a claim.

In fact, the Book is not substantially similar to the allegedly infringing Ad. Indeed, the Plaintiff is unable to point to any similar language or common expression between the works.

1 Rather, Plaintiff's entire claim relies upon the abstract, common ideas of finding a guitar, locating
 2 the owner, returning the guitar, and receiving a token of gratitude from the owner. (Compl. ¶ 11.)
 3 In other words, any similarities exist at only the most abstract, unprotectable level and thus, are
 4 not actionable. Plaintiff has thus failed to state any claim upon which relief can be granted, and
 5 therefore, Mr. Dahl's claims must be dismissed.

6 STATEMENT OF FACTS

7 As set forth in the Plaintiff's Complaint, Mr. Dahl alleges ownership of the Book, and
 8 further alleges that the Book was registered with the United States Copyright Office under
 9 Registration No. TX-7-912-552.¹ For the purposes of this action, Dahl focuses on (but does not
 10 provide copies of) "Chapters 25, 26, and 27" of the Book. (Compl. ¶¶ 9, 11.) Attached hereto as
 11 Exhibit A is a true and correct copy of Chapters 25, 26, and 27 of the Book. Similarly, Dahl
 12 describes, but does not provide, a copy of the Ad at issue. A video of the Ad is being filed with
 13 the Court manually pursuant to Special Order 109, and will be referred to herein as Exhibit B.
 14 Exhibit B is a CD of a true and correct copy of the Ad.²

15 Chapters 25, 26, and 27 of the Book recount Mr. Dahl's real-life experience. Dahl, who is
 16 admittedly a "frequenter of pawn shops," would regularly visit the many pawn shops in Las
 17 Vegas to locate music equipment. *See* Exhibit A, Chapter 25. Dahl describes an occasion in
 18 2009 when he received a telephone call from a pawn broker who "called to let [him] know that a
 19 Gibson Lucille [guitar] was coming" in case Dahl was interested in potentially purchasing the
 20 item. *Id.* Dahl visited the pawn shop the next day to see the guitar. *Id.* The guitar had "a big
 21 '80' inlayed [on the headstock]" instead of the standard Lucille logo, and the word "'Prototype
 22 #1' stamped in white ink at the top of the headstock." *Id.* Dahl purchased the guitar and began to
 23 search for more information about its origins. *See* Exhibit A, Chapters 25-26. After more than
 24 two months of searching, Mr. Dahl says that he received a call from an individual at Gibson

25 ¹ Dahl neglects to attach evidence of his U.S. Copyright Registration to the Complaint, nor does he provide a copy of
 26 the deposit submitted to the U.S. Copyright Office.

27 ² Ninth Circuit law permits the Court to consider documents not specifically incorporated by reference if the
 28 "plaintiff's claim depends on the contents of the document, the defendant attaches the document to its motion to
 dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly
 allege the contents of that document in the complaint." *Kneivel v. ESPN*, 393, F.3d 1068, 1076 (9th Cir. 2005).

1 [Guitar Corporation], who advised Dahl that the guitar was in fact B.B. King's personal Lucille,
 2 that it was stolen, and that Mr. King would really like it back. *See* Exhibit A, Chapter 26. A
 3 meeting was subsequently arranged between Mr. Dahl and Mr. King, where Dahl returned the
 4 guitar to its owner. *See* Exhibit A, Chapters 26-27. In exchange, Mr. Dahl received a different,
 5 autographed, guitar from Mr. King. *See* Exhibit A, Chapter 27.

6 The Ad at issue is a 2015 Toyota Camry commercial, which is part of a larger "Bold"
 7 campaign. (Compl. ¶ 10.) The Ad features a female protagonist and is set in the countryside.
 8 *See* Exhibit B. The woman visits an auction and on a whim, buys a storage locker. *Id.* She
 9 unexpectedly finds an old guitar in the locker, which bears the name "Lucille" on the headstock.
 10 *Id.* She tracks down the previous owner, B.B. King, arrives at one of his concerts, and waits
 11 backstage to reunite him with the guitar. *Id.* Upon seeing his old guitar, Mr. King smiles and
 12 autographs it for her, and gives it back to the surprised protagonist, while the voiceover declares,
 13 "hit the jackpot." *Id.* As the commercial fades out, viewers hear the overarching theme of the
 14 commercial and the larger campaign, "The Bold New Camry. One bold choice leads to another."
 15 *Id.*

16 A simple Google search reveals that stories involving a famous musician losing his
 17 favorite instrument, the instrument being found, and the finder returning the instrument to the
 18 musician, are well-documented in the music industry. Several well-known musicians have lost
 19 guitars, while others have lost different instruments. (*See* Declaration of Tanya H. Miari ("Miari
 20 Decl.") ¶ 2(a) and Exhibit 1 thereto.)³

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24 ³ A court may consider certain materials — documents attached to the complaint, documents incorporated by
 25 reference in the complaint, or matters of judicial notice — without converting the motion to dismiss into a motion for
 26 summary judgment. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (citations omitted); Fed. R. Evid.
 27 201 (permitting a court to take judicial notice of facts that are "(1) generally known within the territorial jurisdiction
 28 of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot
 reasonably be questioned"). In the context of copyright claims, the Court may take judicial notice of generic
 elements of creative works. *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1129 (C.D. Cal 2007) (citations
 omitted); *See also Conn. Comty. Bank v. Bank of Greenwich*, 578 F. Supp. 2d 405 (D. Conn. 2008) (taking judicial
 notice of Google search results).

ARGUMENT

A. LEGAL STANDARD ON MOTION TO DISMISS

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must provide facts sufficient to “raise a right to relief above the speculative level,” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007). A pleading that offers only “labels and conclusions” or “a formulaic recitation of the elements of a cause of action” will not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp.* at 555). A court is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact. *Bell Atl. Corp.* 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)); *Liguori v. Hansen*, 2012 U.S. Dist. LEXIS 31608 at *2 (D. Nev., March 9, 2012).

To establish a successful copyright claim, a plaintiff must show: “(1) his ownership of the copyright; (2) the defendant’s access to his work; and (3) ‘substantial similarity’ between the defendant’s work and his own.” *Berkic v. Crichton*, 761 F.2d 1289, 1291-92 (9th Cir. 1985). A plaintiff’s failure to establish any one of these three elements is fatal to the complaint. *Funky Films, Inc. v. Time Warner Entm’t Co., L.P.*, 462 F.3d 1072, 1081 (9th Cir. 2006) (affirming summary judgment on issue of substantial similarity).

Courts may determine as a matter of law that works are not substantially similar. *Funky Films*, 462 F.3d at 1076-77. If the court concludes that the contested work is not substantially similar to the protectable elements in the plaintiff’s work, dismissal on the pleadings is appropriate. *See id.*; *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1130-31 (C.D. Cal 2007) (citations omitted).

Here, the works at issue are identified in the Complaint, and actual copies are attached to this Memorandum. Thus, the Court may determine as a matter of law that the Ad is not substantially similar to any protectable elements of the Book.

B. DETERMINING COPYRIGHT INFRINGEMENT

To state a claim for copyright infringement, Plaintiff must allege: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). “Copying” as used in the second

1 element requires the Plaintiff to allege that “the infringer had access to plaintiff’s copyrighted
 2 work and that the works at issue are substantially similar in their protected elements.” *Cavalier v.*
 3 *Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002). For purposes of this Motion, Defendants
 4 stipulate to Dahl’s ownership of the Book; the thrust of this Motion turns on the second element
 5 of the claim: “copying.”

6 **1. Access**

7 Plaintiff has utterly failed to plead that the Defendants had access to the Book. *Cavalier*
 8 297 F.3d at 822. Plaintiff alleges that “representatives of Gibson [Guitar Corporation]. . .
 9 communicated to the Plaintiff that the Ad was, in fact, based upon *Plaintiff’s story*.” (Compl. ¶
 10 12)(emphasis added).⁴ Plaintiff then attempts to make the leap that “as a result the defendants
 11 had access to the [2009] story as related in the [2013] Book.” (Compl. ¶ 12.) Not only does this
 12 allegation fail to plead access on its face, but there is no legal basis for making this inference from
 13 any other facts in the Complaint. Plaintiff’s 2009 story is a *factual* event, widely reported on
 14 numerous websites, and even blogged about by the Plaintiff *himself*. (See Miari Decl. ¶ 2(b) and
 15 Exhibit 2 thereto.) Plaintiff again confuses his real-life story (not protectable) with the expression
 16 of the story in his Book (protectable). As discussed further below, Plaintiff cannot claim
 17 copyright protection for actual real life events, the details of which are commonly available in the
 18 public domain.

19 **2. Substantial Similarity**

20 Even if access is present – and Defendants deny this – Plaintiff cannot state a claim if
 21 substantial similarity is lacking. *Krofft Tele. Prods, v. McDonald’s Corp.*, 562 F.2d 1157, 1172
 22 (9th Cir. 1977) (“No amount of proof of access will suffice to show copying if there are no
 23 similarities.”) *superseded on other ground by* 17 U.S.C. § 504(b); *Funky Films* 462 F.3d at 1082
 24 (*quoting* same). If similarity between the Ad and the protectable elements of the Book is not
 25 found, dismissal is required. *See Zella*, 529 F. Supp. 2d at 1133.

26 The Ninth Circuit has traditionally determined whether copying sufficient to constitute

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 28 ⁴ Defendants deny that anyone from Gibson told Mr. Dahl that the Ad was based on his story but, solely for purposes of this Motion, treat the allegation as if it were true.

1 infringement has taken place under a two-part test having “extrinsic” and “intrinsic” components.
 2 *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir. 1994); *Krofft Tele. Prods.*,
 3 562 F.2d at 1164. To assess substantial similarity as a matter of law, the Court must apply the
 4 objective “extrinsic text.” *Funky Films*, 462 F.3d at 1077. The extrinsic test focuses on
 5 “articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and
 6 the sequence of events of the two works.” *Id.* (quotation marks and citation omitted). “In
 7 applying the extrinsic test, this court compares, *not the basic plot ideas for stories, but the actual*
 8 *concrete elements that make up the total sequence of events* and the relationships between the
 9 major characters.” *Id.* (emphasis added)(quotation marks and citation omitted). The Court must
 10 take care to inquire only whether the *protectable elements, standing alone*, are substantially
 11 similar.” *Funky Films*, 462 F.3d at 1077 (*quoting Cavalier*, 297 F.3d at 822)(emphasis in
 12 original). The protectable elements must demonstrate “not just ‘similarity,’ but ‘substantial
 13 similarity,’ and it must be measured at the level of the concrete ‘elements’ of each work, rather
 14 than at the level of the basic ‘idea,’ or ‘story’ that it conveys.” *Zella*, 529 F. Supp. 2d at 1133
 15 *citing Idema v. DreamWorks, Inc.*, 162 F. Supp. 2d 1129, 1179 (CD. Cal 2001). “Similarities
 16 derived from the use of common ideas cannot be protected; otherwise the first to come up with an
 17 idea will corner the market.” *Apple Computer*, 35 F.3d at 1443. “No one can own the basic idea
 18 for a story. General plot ideas are not protected by copyright law; they remain forever the
 19 common property of artistic mankind.” *Berkic*, 761 F.2d at 1293. Familiar stock scenes and
 20 themes that are staples of literature are not protected.⁵ *Id.* at 1294.

21 Thus, as a threshold matter, the extent of Mr. Dahl’s copyright protection in the Book
 22 must be determined by focusing on the concrete “elements” of the work and filtering out the basic
 23 “idea” or “story” that it conveys. *See Shaw v. Lindheim*, 919 F.2d 1353, 1355 (9th Cir. 1990);

24
 25 ⁵ *See, e.g., Funky Films*, 462 F.3d at 1081 (finding no protection for similar plots involving “the family-run funeral
 26 home, the father’s death, and the return of the ‘prodigal son,’ who assists his brother in maintaining the family
 27 business.”); *Kouf v. Walt Disney Pictures & Tele.*, 16 F.3d 1042, 1044-45 (9th Cir. 1994) (finding no protection for
 28 similar plots of shrunken kids and the “life struggle of kids fighting insurmountable dangers”); *Berkic*, 761 F.2d at
 1293 (finding no protection for similar plots of “criminal organizations that murder healthy young people, then
 remove and sell their vital organs to wealthy people in need of organ transplants” and the general store of the
 “adventures of a young professional who courageously investigates and finally exposes, the criminal organization.”)

1 *Apple Computer*, 35 F.3d at 1443. “[T]he court must then apply the relevant limiting doctrines
 2 [such as the “*scènes a faire*” doctrine] in the context of the particular medium involved, through
 3 the eyes of the ordinary consumer of that product.” *Apple Computer*, 35 F.3d at 1443-44.
 4 Finally, “having dissected the alleged similarities and considered the range of possible
 5 expression, the court must define the scope of the plaintiff’s copyright – that is, decide whether
 6 the work is entitled to ‘broad’ or ‘thin’ protection.” *Id.* at 1443. This “scope of protection” sets
 7 the appropriate standard for a subjective comparison of the works to determine whether, as a
 8 whole, they are sufficiently similar to support a finding of illicit copying. *See id.*

9 Here, there is one point of similarity: the instrument is one of B.B. King’s guitars. Mr.
 10 Dahl concludes that because the woman in the Ad finds *that* artist’s guitar – regardless of the
 11 circumstances or the process or the other characters involved – the Ad infringes the Book. But
 12 the actual, concrete, elements of the story are quite different: the woman embarks on her quest on
 13 a whim rather than as an habitué; she finds the guitar by accident rather than by following a tip
 14 from a merchant; she discovers the guitar in a storage locker rather than being directed to the
 15 instrument in a pawn shop; she has no idea who left the guitar while Mr. Dahl went to the pawn
 16 shop because he had been told there was a Lucille guitar available ; the guitar in the storage
 17 locker bears the name “Lucille” on the headstock while the guitar purchased by Mr. Dahl bore a
 18 big “80” on the headstock instead of the standard “Lucille” logo; the woman is surprised to find
 19 the guitar belongs to an artist while Mr. Dahl’s encounter with Mr. King is portrayed as the result
 20 of a long obsession with musical equipment; no one knows why the instrument was in the storage
 21 locker while Mr. Dahl tells of a stolen guitar for which Mr. King yearns; the woman waits
 22 backstage to surprise the artist, who gives her back the guitar in question, while Mr. Dahl’s
 23 encounter is arranged over a period of weeks, and actually results in the return of the guitar to Mr.
 24 King. There is no denying that Mr. King signed on to be paid to perform in the Ad when solicited
 25 by Defendants, but that also is quite different from his actual meeting, gratis, with Mr. Dahl. The
 26 fact that he appears with one of his guitars in both places does not make the Ad an infringement
 27 of Mr. Dahl’s Book.

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1 **C. THE BOOK HAS LIMITED PROTECTION UNDER THE COPYRIGHT ACT**

2 **Ideas.** It is axiomatic that ideas, as opposed to the author's original expression thereof,
 3 are excluded from the substantial similarity analysis. *See* 17 U.S.C. § 102(b) (Copyright Act does
 4 not protect ideas); *Feist*, 499 U.S. at 350; *Mazer v. Stein*, 347 U.S. 201, 217 (1954); *Krofft Tele.*
 5 *Prods.*, 562 F.2d at 1163. Certain forms of literary expression are *not* protected against copying;
 6 the general idea for a story is among these. *Berkic* 761 F.2d at 1293. Here, Mr. Dahl cannot
 7 claim copyright protection in the *idea* of a story about a lost or stolen guitar which is returned to
 8 its owner (in contrast to the story in the Ad, where the owner of the guitar autographs it and gives
 9 it back to the finder). To allow protection for such general concepts or ideas would be to seize
 10 those ideas from the public domain and render them unavailable for exploitation for the duration
 11 of the copyright, which is precisely what the doctrine underlying the idea-expression dichotomy
 12 aims to prevent. *See id.* at 1293-94.

13 **Scènes a Faire.** Moreover, copyright protection does not extend to “*scènes a faire*”
 14 which are “situations and incidents that flow necessarily or naturally from a basic plot premise.”
 15 *Cavalier*, 297 F.3d at 823; *See also Berkic* 761 F.2d at 1293. The common use of familiar scenes
 16 and themes cannot raise a triable issue of fact on a plaintiff's copyright claim. *Berkic* 761 F.2d at
 17 1294. *See, e.g., Flynn v. Surnow*, 70 U.S.P.Q.2d 1231, 1237 (C.D. Cal. 2003) (finding that the
 18 use of a sniper rifle by an assassin was “an example of a scene a faire which flows naturally from
 19 a plot about an assassination attempt”); *Zella*, 529 F. Supp. 2d at 1129 (finding “stock elements
 20 of a host, guest celebrities, an interview and a cooking segment” to be *scenes a faire* of a
 21 cooking-and-home-related talk show); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1177 (9th Cir.
 22 2003) (finding that “the sequencing of first performing [a magic] trick and then revealing the
 23 secrets behind the trick is subject to the limiting doctrines of merger and *scenes a faire*.”).

24 With respect to the Book, the lost instrument, the original musician owner, the finder of
 25 the instrument and the return of the instrument are *scènes a faire* which flow from the common
 26 plot about a lost-and-found personal item. This story is quite common and indeed B.B. King
 27 himself nearly lost his first guitar in a fire, which is how the now-famous “Lucille” guitar derived
 28 its name. (*See* Miari Decl.¶ 2(c) and Exhibit 3 thereto.) This Court should take judicial notice

1 that the storyline of a lost instrument found and returned to its original owner is common and
2 prevalent in public works.⁶

3 **Facts.** Facts are not themselves copyrightable (though original compilations/arrangements
4 of facts may be). *Feist*, 499 U.S. at 347-48. “The *sine qua non* of copyrightability is originality.
5 To qualify for copyright protection, a work must be original to the author Original, as the
6 term is used in copyright, means only that the work was independently created by the author (as
7 opposed to copied from other works), and that it possesses at least some minimal degree of
8 creativity.” *Id.* at 345 (citations omitted). As noted above, for the purposes of this Motion,
9 Defendants do not dispute that the Book contains some modicum of originality and creativity
10 such that it is protectable under copyright. However, “the mere fact that a work is copyrighted
11 does not mean that every element of the work may be protected . . . copyright protection may
12 extend only to those components of a work that are original to the author.” *Id.* at 348. Here, Mr.
13 Dahl’s factual real-life experience is not a protectable element. The arrangement of the factual
14 encounter, *as expressed in the Book* is the work in which Dahl may claim protection.

15 Based on the foregoing, the Book can only be the subject of limited, thin protection,
16 meaning that only if the contested work is “virtually identical” will it give rise to an infringement
17 claim. *See Apple Computer*, 35 F.3d at 1446-47. As shown both above and below, it is plain that
18 the Book and the Ad are *not* substantially similar, much less virtually identical, and thus
19 Plaintiff’s claims must fail.

20 **D. PLAINTIFF CANNOT ESTABLISH SUBSTANTIAL SIMILARITY OF ANY**
21 **PROTECTABLE ELEMENTS**

22 The final task is for the Court to determine whether the protectable elements of the Book
23 and the Ad are substantially similar. *Funky Films*, 462 F.3d at 1077 (quotations omitted). Here,
24 this case is particularly well-suited for dismissal on the pleadings, because the Ad does not
25 incorporate *a single protectable element* of the Book.

26 Quite simply, apart from the unprotectable elements described above, Mr. Dahl cannot
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28 ⁶ *See* n. 3, *supra*.

1 identify a single expressive element that can be found in both the Ad and the Book. The
 2 differences can be summarized as follows:

- 3 • **Plot:** The Book, specifically Chapters 25, 26, and 27, tells the story of a guitar that was
 4 purchased at a pawn shop in Las Vegas and discovered to be B.B. King's personal guitar
 5 that had been stolen from him; a fact Mr. Dahl later learns from Gibson Guitar Corp. A
 6 meeting is arranged by a third party, Mr. King's manager, between the purchaser of the
 7 guitar and Mr. King at Mr. King's office, where the guitar is returned and the purchaser is
 8 given an autographed new guitar in exchange. The Ad tells the story of a woman who
 9 drives a Toyota Camry to an auction and buys a storage locker as a bold move. A guitar is
 10 unexpectedly found in the storage locker. The woman takes a risk of tracking down the
 11 original owner, taking a guitar which bears the name "Lucille" to B.B. King. She
 12 attends his concert and goes backstage, where she has an impromptu meeting with the
 13 artist (Mr. King is not identified in the Ad), he autographs the original guitar and lets her
 14 keep it. The only commonality between the two plots is B.B. King's loss of a guitar
 15 which the finder shows him – a factual occurrence for which Plaintiff cannot claim
 16 protection.
- 17 • **Themes:** Although both works explore the common theme of a lost-and-found instrument,
 18 they are quite different. The chapters at issue in the Book simply have a narrative quality,
 19 and recount a factual series of events which began when the Plaintiff made a deliberate
 20 decision to buy a guitar. The Ad has the theme of seizing the day, trying something
 21 unexpected and experiencing positive results. The overarching theme of the campaign for
 22 which the Ad was created is the concept of taking a "bold step."
- 23 • **Dialogue:** The relevant chapters in the Book mainly contain dialogue between the
 24 Plaintiff and Mr. King. The Ad does not feature any dialogue between the protagonist and
 25 a third person, but rather is presented as a narrator's voice over as the woman takes the
 26 actions described above.
- 27 • **Setting, Mood, and Pace:** Chapters 25, 26 and 27 in the Book take place in Las Vegas,
 28 including at a pawn shop and Mr. King's office. The Ad begins with a woman arriving at

1 an unknown auction. It then depicts the storage locker she wins, and shows her driving
2 various places to locate the owner. The Ad culminates in the woman arriving backstage at
3 a musical venue. The moods of the two works are also quite different. The Book is a
4 realistic narrative, while the Ad is an inspirational dramatization of the possible outcomes
5 from taking a “bold step.” The 30-second Ad moves at a much faster pace than the Book.
6 Beyond the basic premise that a lost-and-found instrument belongs to B.B. King, there are
7 no similarities in the setting, mood, or pace of the two works.

- 8 • **Characters:** The relevant chapters in the Book involve, mainly, the Plaintiff, Chaz Starr
9 (the pawn shop owner), Pat Foley (an employee of Gibson Guitar Corp.), B.B. King, and
10 various employees of Mr. King. The Ad involves, mainly, an unidentified woman, and
11 Mr. King.

12 In short, other than unprotectable ideas, facts, and *scènes a faire*, nothing about the two
13 works at issue is similar. Thus, Mr. Dahl’s claim must be dismissed as a matter of law.

14 Moreover, even if any of the similar material in both the Book and the Ad *were*
15 copyrightable – and Defendants dispute that it is – such material represents only a *de minimis*
16 amount and is overwhelmed by the vast differences between the works such that the common
17 features do not allow a reasonable inference that the works are substantially similar. *Berkic*, 761
18 F.2d at 1294.

19 Mr. Dahl’s second and final claim is for attorneys’ fees and costs and is necessarily reliant
20 upon the success of Dahl’s first claim. Because Mr. Dahl’s claim for copyright infringement
21 must fail, so too, must his claim for attorneys’ fees and costs.

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1 **CONCLUSION**

2 None of the similarities between the Book and the Ad are of protectable elements.
3 Accordingly, the works cannot be found “substantially similar” as a matter of law. Defendants
4 respectfully submit that their Motion to Dismiss Plaintiff’s Complaint be granted, that the
5 Complaint be dismissed with prejudice and without leave to amend, and that judgment be entered
6 in favor of all Defendants.

7 Respectfully submitted,

8 Dated: January 15, 2015

9 By: /s/ Jacob A. Reynolds

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Pro hac vice to be filed

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CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this 15th day of January, 2015, I caused the above and foregoing document entitled **DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)** to be served electronically by the court to all attorneys or parties on the Service List of the above-entitled matter through NEF pursuant to LR 5-4 and/or:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage is to be prepaid in Las Vegas, Nevada; and/or

☐ to be hand-delivered;

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